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NOTES

THE RIGHT TO COUNSEL: A COMPARATIVE ANALYSIS OF THE UNITED STATES AND GREAT BRITAIN

I. Introduction

"You have a right to the presence of an attorney and if you cannot afford one, one will be appointed for you." So reads a common form of one of the warnings required by the United States Supreme Court in *Miranda v. Arizona*,¹ a warning that has become famous among judges, lawyers and the general public. *Miranda* is only one in a series of cases in which the Supreme Court has considered, interpreted and defined the defendant's right to counsel in the American criminal process. That there is a right to counsel is beyond dispute. The arguments arise concerning its extension or restriction. As with any point of law, there are, on the one hand, those who feel that the right to counsel in the United States has been stretched far beyond a reasonable interpretation of the sixth and fourteenth amendments, and on the other hand, those who think that the protection is not complete enough. To determine how much real protection is provided by the right to counsel as established in the United States, it is helpful to examine how the same concept is applied in another advanced legal system. This note undertakes a comparison between the United States and the United Kingdom, focusing on those stages of criminal proceedings in America where there is a right to counsel and roughly similar stages in British proceedings. There are interesting questions to be answered: Are British defendants represented to the extent their American counterparts are? Is counsel for the British defendant really a *right*? What are the advantages and disadvantages of each system at various points? What is the trend in the respective countries, restriction or expansion?

II. The British Court System

Before any comparison can be made, at least a skeletal understanding of the British criminal process is essential.² The backbone of the British court system is the Magistrates Court. These courts, sitting in every locality, are of two types. The large majority are composed of "magistrates" who are not lawyers and sit in groups of three, advised and assisted by a clerk who is a lawyer.³ In contrast, the tribunals serving London consist of judges who are lawyers and who sit alone. Exercising statutory jurisdiction, the magistrates handle the initial stages of all criminal cases and conclude approximately 97 percent of Britain's criminal prosecutions.⁴ They have jurisdiction to con-

1 384 U.S. 436, 470-73 (1966).

2 For a thorough explanation of the material discussed briefly here, see R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 122-322 (6th ed. 1972).

3 English, *Of Course the British System Is Better Than Ours—Or Is It?* 53 CHI. B. REG. 342, 344 (1972).

4 *Id.*

sider both summary (minor) and indictable offenses, the latter being those for which a defendant can ask for and get a jury trial in the next higher court. Those offenses which fall under both headings can be tried in either court. When a case is heard before the magistrates, the court serves as trier of both law and fact.

If a defendant is brought before the magistrates for an indictable offense and elects trial by jury after being informed of the charges, the court undertakes committal proceedings. Under what is termed "old-style" committal, all witnesses the prosecution intends to call are brought before the court to testify and to verify their transcripts at the conclusion of their testimony. If the defendant so wishes, he can then call witnesses in his own behalf. When the process is complete, the court determines whether or not the defendant should be committed for trial. A defendant has a right to elect this type of committal proceeding. Faster and more prevalent today is the "new-style" committal proceeding. Under this arrangement, the defendant is given a copy of statements taken by police from the prosecution witnesses even before he appears before the magistrates. Upon his consent, he can immediately be handed over for trial, thereby totally avoiding formal proceedings in the Magistrates Court. To insure a valid consent, the "new-style" committal cannot be employed unless the defendant is represented by a lawyer. Since the "new-style" process is generally considered more advantageous to all concerned, there is a high incidence of representation at these proceedings.⁵

The utility of Magistrates Court is clear. This one body can and does serve to dispose of summary and many indictable offenses and, as a pretrial arrangement, it wraps into one operation the American arraignment, preliminary hearing and grand jury proceeding.

Above the Magistrates Court sits the Crown Court which came into existence in 1972 with the merger of the Courts of Quarter Sessions and Assizes. The Crown Court is a tribunal for hearing indictable crimes and has jurisdiction over any indictable offense though in reality only the more serious crimes not handled by the Magistrates Court come before it. It is the point in the British system where the defendant receives a jury trial. This court also decides appeals from conviction or sentence meted out by the Magistrates Court. Its function as an appellate court is unique in that the appeal is *de novo*, and the court can redetermine matters both of law and fact.⁶

There are three appellate courts above the Crown Court. The Court of Appeals Criminal Division is an intermediate court that has jurisdiction to hear appeals on all indictable crimes. The Divisional Court of the Queens Bench Division hears appeals on questions of law only, either from the Magistrates Court or the Crown Court. This court is generally concerned with the construction and interpretation of statutes. The highest appellate court in Britain is the House of Lords.⁷

5 Interview with Mr. Keith Uff, Barrister at Law and Lecturer in Law at University of Birmingham (Eng.), in London, Oct. 14, 1973.

6 R. JACKSON, *supra* note 2, at 153.

7 *Id.*

III. Nature of the Right to Counsel in the Two Systems

In the United States, if a defendant has a right to counsel at a particular proceeding and if the proceeding takes place with neither counsel nor a valid waiver, then it can be declared void. The court has a duty to assure representation even to the point of itself placing an attorney in the courtroom.⁸ This duty of having counsel present exists not only at the trial stage but also for custodial interrogations, postindictment lineups, preliminary hearings, and with regard to minors, delinquency proceedings.⁹ Anything less violates the sixth and fourteenth amendments.

In the United Kingdom on the other hand, there are few instances where a court is actually required to provide representation to protect the rights of an accused person. The governing provisions are in the Criminal Justice Act of 1967¹⁰ and make the appointing of counsel mandatory only in cases where a defendant is charged with murder or where the prosecution appeals or applies for leave to appeal from the Court of Appeal Criminal Division (or the Courts-Martial Appeal Court in military cases) to the House of Lords.¹¹ Since the Criminal Justice Act of 1972,¹² a broad third category has been added which makes counsel mandatory at most sentencing proceedings. In all other cases the courts have total discretion which will be exercised only if the court decides that representation is desirable "in the interests of justice" and that the defendant is in financial need.¹³ There is some question as to whether an order for counsel becomes mandatory once these criteria are met. There are those who maintain that court-appointed counsel always remains a privilege to be granted in the discretion of the court and is not a right to which an accused in need is entitled.¹⁴ Others contend that once the criteria are met, the appointment of counsel is no longer discretionary with the court but mandatory.¹⁵

Thus far, the British courts have upheld the discretionary aspect of providing representation. In *Regina v. Derby Justices*¹⁶ it was said that, subject to the mandatory limitations, the British courts have complete discretion under the Criminal Justice Act of 1967 whether or not to appoint counsel in criminal proceedings. The court made it clear that under the 1967 Act any doubts are to be resolved in the defendant's favor.¹⁷ However, this does little to mitigate the harshness of the fact that a defendant is not given absolute protection and that he may appear in court unrepresented if a determination has been made that representation is not "in the interests of justice." The security provided a

8 *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

9 41 *FORDHAM L. REV.* 722, 725-26 (1973).

10 Criminal Justice Act 1967, c. 80, §§ 73-84.

11 *Id.* § 75(1) (a) and (b).

12 Criminal Justice Act 1972, c. 71, § 37.

13 Criminal Justice Act 1967, c. 80, § 75(1) and (2).

14 G. BORRIE & J. VARCOE, *LEGAL AID IN CRIMINAL PROCEEDINGS* 25 (1970) [hereinafter cited as BORRIE & VARCOE].

15 G. GREENE, *CRIMINAL COSTS AND LEGAL AID* 67 (3d ed. 1973) [hereinafter cited as GREENE].

16 [1971] 1 Q.B. 147 (1970).

17 Criminal Justice Act 1967, c. 80, § 75(5):

Where a doubt arises whether a legal aid order would be made for the giving of aid to any person, the doubt shall be resolved in that person's favor.

criminal defendant in the United States by the sixth and fourteenth amendments is notably absent in the British system.

Despite these shortcomings, the British system of criminal representation is in some ways more comprehensive than that in the United States. All the British courts discussed earlier, with the exception of the Divisional Court of the Queens Bench Division, can order the presence of counsel¹⁸ in any proceeding in which a defendant is brought before the court "to be dealt with."¹⁹ This means that in addition to trial and appeal, appointment of counsel is also possible, for example, in cases of breach of probation, noncompliance with conditional discharge, and breach of recognizance to keep the peace.²⁰ Thus, while United States courts are duty-bound only in relatively clearly defined areas, a British court will provide representation at any stage and at any proceeding if it is deemed to be in the interests of justice.

A greater degree of flexibility is therefore inherent in the British method. In addition, once it is determined that a defendant should be represented, he is allowed to choose his own lawyer, in contrast to the court-appointment procedure in the United States.²¹ As might be expected, this has a great influence on how complaints concerning the incompetence of counsel are handled.²² Finally, the discretion allowed in the English system in lieu of an expanded series of specified rights usually does result in defendants receiving representation.

IV. Representation at Various Stages of the Criminal Process

A. Custodial Interrogations

In the United States it has been clear since the 1966 *Miranda* decision that a defendant's right to counsel first attaches at a custodial interrogation. The majority opinion in that case made it clear that when a person is deprived of his freedom in a significant way by custody and is subjected to questioning, his fifth amendment privilege against self-incrimination is jeopardized to the point that procedural safeguards must be taken.²³ One safeguard deemed indispensable by the Court was the presence of defendant's counsel at any interrogation sessions. The Court considered it so important that it laid down rules requiring that a person in custody be informed of his right to have counsel, private or appointed, present for any questioning.²⁴ The Court held that custodial

18 GREENE, *supra* note 15, at 56 n.3.

19 Criminal Justice Act 1967, c. 80, § 73.

20 BORRIE & VARGOE, *supra* note 14, at 15.

21 GREENE, *supra* note 15, at 68.

22 The Criminal Justice Act 1967, c. 80, § 82 does allow complaints against the quality of legal representation. The machinery for handling them is contained in the Legal Aid in Criminal Cases Rules (STAT. INSTR. 1968, No. 1220). The Rules allow a Complaints Tribunal to hear evidence, make joint findings of fact, and make orders of a disciplinary nature and as to costs against a lawyer when a complaint is substantiated. When the complaint is proved, the tribunal can exclude a lawyer or his firm from acting as a court-appointed lawyer, reduce or cancel his payment for services rendered on the order of the court, or cause him to pay all or part of the costs of the proceeding.

Throughout the disciplinary process, the defendant's cause does not get much attention. There is no indication that a proceeding is rendered void by incompetence of counsel.

23 384 U.S. 436, 478-79 (1966).

24 *Id.* at 474.

interrogation contained inherently compelling pressures which worked to undermine the will of those accused or suspected of crime to resist an infringement of their fifth amendment right.²⁵ The presence of counsel, it was thought, would mitigate the dangers of police coercion.²⁶

The considerations and conditions which led to the *Miranda* decision in the United States are not viewed as troublesome in Britain. The right established in *Miranda* simply has no British counterpart. There is no right to counsel during interrogation and there is no ground swell among those connected with the judicial system to get one established. The only provision for an accused in custody in Britain is contained in the guidelines known as the Judges' Rules.²⁷ Judges' Rule C provides that the accused should be allowed to consult privately with his lawyer at any stage of a criminal investigation provided it causes no unreasonable delay or hindrance to the process of the investigation and the administration of justice.²⁸ This language is sufficiently ambiguous to make a determination of the value of the Rule very difficult. It is clear that it does not *require* the presence of a lawyer during a custodial interrogation. That the absence of counsel is acceptable to the British judiciary is shown by a statement made in 1971 by Lord Widgery, head of a 1966 committee which thoroughly investigated the concept of court-ordered counsel:

Any rule requiring the presence of the suspect's lawyer during interrogation is quite unacceptable. It would no doubt be an excellent thing for an independent third party to be present so that he could later testify to the court as to what had taken place, but the accused's lawyer is not an independent party.²⁹

The divergence between this view and that of *Miranda* is clear. In the United States counsel is required during an interrogation precisely *because* he is not an independent party but is someone who will work to safeguard the rights of the party being questioned. There is a positive duty to protect the client. Lord Widgery's statement indicates the assumption that a suspect being questioned needs no such protection, possibly based on the premise that there is no police coercion requiring extra precautions. Surely, there can be no intention to give the police any unfair advantage. Yet, that is exactly what the British policy fosters since there is no reason to think that police activities feared in America differ radically from those employed in the United Kingdom. Indeed, readers of British newspaper accounts of criminal investigations are often informed at the close of a story that a particular individual is "helping police with their inquiries," *i.e.*, is being held for questioning but not charged. There is no right to counsel during these "assistance" sessions, a situation which our own Supreme Court found impermissible.

²⁵ *Id.* at 467.

²⁶ *Id.* at 470.

²⁷ 1964 CRIM. L. REV. (Eng.) 166, 166-70. The Rules have been made by the judges of the Queen's Bench Division as a guide to police officers conducting interrogations. They do not have the force of law, but serve as guidelines as to what the judges will consider to be proper police conduct when ruling on the admissibility in evidence of statements given by a defendant to the police. *Id.* at 165.

²⁸ 1964 CRIM. L. REV. (Eng.), 166, 167.

²⁹ The Times (London), July 17, 1971, at 3, col. 5.

While there is no right to have counsel actually present during an interrogation session in Britain, Judges' Rule C does allow a suspect to contact his lawyer, who may give timely advice as to how the defendant should handle himself during any questioning. The Widgery Committee on Legal Aid suggests that a defendant should be informed of his right to at least consult an attorney as soon as possible after he is taken into custody.³⁰ This is carried out to some extent through leaflets which the British Home Office provides to the police for distribution to those taken into custody. There are assertions that this procedure is inadequate because many suspects never receive the leaflets and, in any case, it is too complicated to be useful.³¹ In addition, there is little incentive for the police to be diligent in informing a suspect in this regard since there is no sanction for failure to do so. Nevertheless, suspects often know of Judges' Rule C and their attempts to invoke it meet with varying results. The Widgery Committee stated that the evidence it gathered showed that the police would not put unreasonable obstacles in the path of a defendant in a police station who wanted to obtain legal advice,³² but the findings of certain surveys dispute this conclusion. In one poll of 132 suspects taken to the police station and later convicted, it was found that 57 percent of the 132 asked to see a lawyer immediately on their arrival at the police station. Forty-two, or 74 percent, of those asking for counsel were refused.³³ Likewise, in another sample of 33 suspects, 22 said they felt they needed legal advice at the station. Of these 22, 13 attempted to obtain advice and 8 of these maintained that the police had been unhelpful or had actually tried to prevent or dissuade them from seeking legal assistance.³⁴ Such results bring into question the ultimate effectiveness of Rule C.

Discussion of custodial interrogation would be incomplete and unfair without mention of the warnings against self-incrimination actually given to a defendant by the British police. When the police in England obtain sufficient evidence which provides reasonable grounds for suspecting an accused has committed an offense, warnings against self-incrimination are called for under Judges' Rule II.³⁵ These warnings refer to the suspect's right to remain silent and the idea that anything he says may be used in evidence against him. These warnings actually serve as a basis for the formulation of the American *Miranda* warnings.³⁶ The disturbing fact is that the evidence which results in the need for the warnings may at times be obtained during custodial interrogation. In effect, this demeans the value of the warnings because they may not be required until the police get at least part of what they are after. Thus, custodial questioning without the presence of counsel can itself be used at times to provide reasonable grounds for suspecting an accused has committed an offense. By American standards, these warnings are rather late and may in some instances come after

30 REPORT OF THE COMMITTEE ON LEGAL AID IN CRIMINAL PROCEEDINGS (WIDGERY COMM.), CMND. No. 2934, at 58 (1966) [hereinafter cited WIDGERY COMM.].

31 BORRIE & VARCOE, *supra* note 14, at 12.

32 WIDGERY COMM., *supra* note 30, at 57.

33 Zander, *Access to a Solicitor in the Police Station*, 1972 CRIM. L. REV. (Eng.), 342.

34 BORRIE & VARCOE, *supra* note 14, at 11.

35 1964 CRIM. L. REV. (Eng.) 166, 167-68.

36 384 U.S. 436, 487 n.57 (1966).

the damage against which they are meant to guard has already occurred. In some cases questioning before these cautions have been given is simply investigatory. Even after the warnings are given, a defendant has no right to have counsel present during the interrogation. It is also important that the Judges' Rules do not have the force of law. The only sanction for violation is that evidence obtained in violation of the Rules is excludable at the court's *discretion*. Thus, any advantage gained by a defendant from the warnings may instantly be rendered nugatory. There are allegations that the tendency of the courts is to rule in favor of illegally obtained evidence if it is needed to convict.³⁷ The tendency is supposedly even stronger if the evidence violates the Rules alone and does not violate another law of evidence as well.

This makes clear that the law in the United Kingdom has not gone to the lengths the American system has in affording a more complete protection for an accused during custodial interrogations. Unlike in the United States, an interrogation without counsel will go on even if a defendant requests the presence of a lawyer since there is no provision for counsel at this stage, discretionary or otherwise. Even if a suspect chooses to exercise his right to consult privately with his attorney, empirical evidence has shown that it is often not permitted. Such practices show the value of having an established right to counsel during interrogations as it exists in the United States.

B. Lineups

The case of *United States v. Wade*³⁸ established the lineup as a critical stage of the criminal prosecution in the United States and made the presence of counsel mandatory. The Supreme Court recognized that the lineup is a stage of the proceeding in which a defendant's fate may be determined, and the absence of counsel may derogate from the accused's right to a fair trial under the sixth amendment.³⁹ A similar analysis was used in *Gilbert v. California*.⁴⁰ The *Wade-Gilbert* rationale stood intact until the 1972 decision of *Kirby v. Illinois*.⁴¹ In that case the Court restricted the scope of the *Wade-Gilbert* formula by holding that the right to counsel attaches for sixth amendment purposes only after the initiation of formal criminal proceedings.⁴² The Court said that in all of its previous cases in which a right to counsel had been established, the proceeding in question was one that occurred after the state had initiated the criminal process through a formal charge, preliminary hearing, indictment, information or arraignment.⁴³ Therefore, a postindictment lineup would be covered by the right to counsel; but the Court held this not to be the case for preindictment lineups that occur before the initiation of formal criminal proceedings by the state. This modification may have a great impact. It has been suggested, for example, that there will be few *Wade*-type lineups

37 Zander, *supra* note 33, at 342 n.3.

38 388 U.S. 218, 236-37 (1967).

39 *Id.* at 226.

40 388 U.S. 263, 267 (1967).

41 406 U.S. 682 (1972).

42 *Id.* at 688.

43 *Id.* at 688-89.

in the future since all the police and prosecutor need do now is insure that the lineup takes place before the initiation of a criminal prosecution. Since this is usually possible, postindictment lineups may be abandoned and counsel will be effectively precluded from serving his desired purpose at such proceedings.⁴⁴

The overall impact of *Wade* and *Gilbert* has been weakened by the Court's decision in *United States v. Ash*.⁴⁵ In that case the Court clarified its position with regard to the right to counsel at photo lineups, holding that no right to counsel exists on behalf of a defendant at a postindictment photographic display.⁴⁶ The Court felt that no assistance was required for the defendant at this point to help him cope with legal problems or meet an adversary, as may be the case in a standard lineup. In short, it was decided that a postindictment photographic display is not a critical stage of the prosecution in which there is an advantage given to prosecuting authorities that can only be counteracted by the presence of counsel. Thus, the extra safeguard of a right to counsel is not required.⁴⁷

Decisions such as *Kirby* and *Ash* indicate that the present Supreme Court has no inclination to expand the *Wade-Gilbert* test. Whether the current American viewpoint would be well received by an even more conservative British judiciary is open to conjecture. On the whole, there is very little controversy in England with regard to the traditional lineup.⁴⁸ There is no right to counsel to the extent that assistance will be provided if the suspect wants it, but there are other safeguards. British procedure calls for informing a suspect that he may have a friend or his lawyer present at the lineup and the suspect is also to be asked if he objects to the persons present or the arrangements made.⁴⁹ In addition, once the lineup is arranged, the entire proceeding must take place in the presence and hearing of the suspect, including any instructions to witnesses attending concerning procedure.⁵⁰ As in the field of custodial interrogation, the British have not felt the need to extend to a suspect at this point in the criminal process the full benefits of a right to counsel that a *Wade-Gilbert* rationale affords. Yet, this may be a hollow criticism for if American law enforcement officials, relying on *Kirby*, can effectively avoid the presence of counsel at lineups altogether, then the British safeguards, while not as forceful in written terms, will in practice be more protective than measures taken in the United States.

The British approach to photo displays is clearly more protective than that employed in the United States. Photo lineups have been viewed with disdain in England since the early part of this century. In the 1925 case of *Rex v. Dwyer*,⁵¹ the Court of Criminal Appeal held that it was improper for the police dealing with witnesses who are later to be used as identifying witnesses to show

44 11 DUQUESNE L. REV. 405, 410 (1973).

45 413 U.S. 300 (1973).

46 *Id.* at 321.

47 *Id.* at 317-20.

48 Murray, *The Criminal Line-Up at Home and Abroad*, 1966 UTAH L. REV. 610.

49 J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES § 1353 (38th ed. 1973) [hereinafter cited as J. ARCHBOLD].

50 *Id.* § 1352 (5).

51 [1925] 2 K.B. 799 (1924).

those persons photos of those whom they will be asked to identify. This view was reaffirmed in *Rex v. Haslam*⁵² where the same court held it was incorrect conduct for the police to assist in the identification of a suspected person already under arrest by showing photos, including that of the suspect, to persons who may be called upon to identify him. Today's approach is couched in terms disfavoring the showing of photos to a witness for identification purposes if the circumstances will allow a personal identification and an improper showing will considerably detract from the value of a witness's identification evidence.⁵³ This attitude toward photo identifications is a healthy one. While consideration of photo lineups in the United States is directed toward the right to counsel, the British viewpoint addresses a more fundamental question: Why should photo identifications be allowed at all if there is another feasible alternative? A personal confrontation surely creates a situation more similar to what a person actually saw than a photograph. Since *Ash*, photo identifications will be allowed in a private session, with both state functionaries and the witness present. In such a situation a suspect is left highly vulnerable. Any proposal for an adoption in this country of the British procedure would be worthy of close scrutiny and its acceptance should not unduly hamper the actual identification of criminal suspects.

C. *Pretrial Court Proceedings*

Given both the discretionary nature of court-ordered counsel in Britain and the fact that counsel will not be provided at custodial interrogations or lineups, the first point in the British system at which there is an exercise of this discretion in favor of the defendant is the committal proceeding, generally called a preliminary hearing. That there is a right to counsel at this stage in the United States is indisputable. In the early 1960's it was decided in *Hamilton v. Alabama*⁵⁴ and in *White v. Maryland*⁵⁵ that in stages of the proceedings where a defendant is required to enter a plea or assert a defense that would be irretrievably lost if not asserted, the presence of counsel is required. It was deemed inconsequential whether the proceeding was called an arraignment or preliminary hearing; it is a critical stage where the absence of counsel may be severely prejudicial to the defendant. The rationale of these two cases was extended in 1969 in *Coleman v. Alabama*⁵⁶ where the Court found a right to counsel at a traditional preliminary hearing; that is, one in which there is simply a determination of whether an offense has been committed, whether there is probable cause for holding the accused and whether there should be bail.⁵⁷ The Court said that even the traditional preliminary hearing is a critical stage where substantial prejudice to a defendant's rights inhere and where counsel is needed

52 19 Crim. App. 59 (1925).

53 J. ARCHBOLD, *supra* note 49, at § 1351.

54 368 U.S. 52, 54 (1961).

55 373 U.S. 59 (1963).

56 399 U.S. 1, 7 (1969).

57 45 Tul. L. Rev. 1056, 1057 n.6 (1971).

to avoid that prejudice.⁵⁸ In effect, the right to counsel now attaches at all preliminary hearings in the United States.

The British committal proceeding serves the function carried out in the American preliminary hearing but also includes the duties handled by the American grand jury. There is no right to counsel at a grand jury proceeding in the United States.⁵⁹ This makes more difficult a comparison of the systems at this particular stage. Representation at a British committal proceeding is discretionary because it is classed as one of the situations where an accused is brought before the court "to be dealt with."⁶⁰ Normally, it is considered in the interests of justice for aid to be provided so long as this proceeding is considered a part of the criminal process.⁶¹ There are even suggestions of adding this to the small list of areas where counsel should be granted as of right,⁶² but they remain unacted upon and discretion continues to govern. Several commentators have exhorted the judges of committal proceedings to exercise their discretion liberally in favor of the defendant, not leaving it to the trial court to exercise its own power to provide counsel.⁶³ Such exhortations are being heeded. In 1972, 97.9 percent of those asking for legal aid received it, while 2.1 percent were refused.⁶⁴ This is up from 1970 figures of 96.8 percent and 3.2 percent, respectively.⁶⁵ Unfortunately, there are no figures available recording the number who went unrepresented at the proceeding because they failed to ask for assistance. In practice this number is most likely small since most committals are "new style" and these cannot be employed unless the defendant is represented by counsel. In this manner, there is built-in protection against nonrepresentation. Giving ample discretion to the courts, at least in this area, has thus not resulted in large numbers of defendants going unrepresented; and remembering that British committal proceedings encompass the duties of the American grand jury, it can reasonably be said that representation in pretrial court proceedings in England is even more extensive than in the United States.

D. Representation at Trial

*Gideon v. Wainwright*⁶⁶ and *Argersinger v. Hamlin*⁶⁷ were the decisions in which the United States Supreme Court settled the issue of right to counsel at trial. In *Gideon*, the Court found the right applicable to felony cases, and in *Argersinger* it was held to apply to imprisonable misdemeanors. The latter involves a complex enforcement procedure since it requires a pretrial determination by the judge as to whether or not there will be a prison sentence imposed in the event of conviction. If there is an affirmative decision, the right

58 399 U.S. 1, 9 (1969).

59 *In re Groban*, 352 U.S. 330, 333 (1957).

60 Criminal Justice Act 1967, c. 80, § 73(2). See text accompanying note 19 *supra*.

61 WIDGERY COMM., *supra* note 30, at 49.

62 BORRIE & VARCOE, *supra* note 14, at 67.

63 See, e.g., GREENE, *supra* note 15, at 67.

64 1972 CRIMINAL STATISTICS FOR ENGLAND AND WALES, CMND. No. 5402, at 211 (1973) [hereinafter cited as 1972 CRIMINAL STATISTICS].

65 1970 CRIMINAL STATISTICS FOR ENGLAND AND WALES, CMND. No. 4708, at 213 (1971) [hereinafter cited as 1970 CRIMINAL STATISTICS].

66 372 U.S. 335 (1963).

67 407 U.S. 25 (1972).

to counsel attaches. There have been complaints that this method in itself is prejudicial in that it requires a judge to examine a case with an eye toward the ultimate punishment even before he actually hears the evidence. This initial examination, it is felt, may have a lasting impact on the judge which will impair his ability to make a judgment on the merits independent of his previous considerations.⁶⁸ This claim has merit when considered in the context of the overall American system. With respect to the British process, however, such criticism would not apply. With the British emphasis on discretion, this same type of examination is required with reference to the appointment of counsel at almost every stage of the British proceedings, although it is not limited to a possibility of sentence. The whole gamut of the "interests of justice" and the "financial need" of the defendant must be considered by the British courts. Though the first criterion is a vague one, certain guidelines have been established for utilization by the Magistrates Courts (97 percent of all criminal cases)⁶⁹ in deciding if representation will be in the interests of justice. They include:

1. Whether the charge is a grave one such that the accused may lose his liberty or livelihood, or suffer serious damage to his reputation.
2. Whether the charge raises a substantial question of law.
3. Whether the accused is unable to follow the proceedings and state his own case because of inadequate knowledge of the English language, mental illness, or other mental or physical disability.
4. Whether the nature of the defense involves the interviewing and tracing of witnesses or expert cross-examination of a witness for the prosecution.
5. Whether representation is in the interests of someone other than the accused, as for example, in the case of sexual offenses against young children when it is undesirable that the accused should cross-examine the witness in person.⁷⁰

If none of these are present, then it is considered that the interests of justice do not require legal representation for the accused. The presence of one or more of these factors indicates the desirability of counsel.⁷¹ As appropriate as this test may seem, it is difficult to see how it is ever "in the interests of justice" to send a defendant in a criminal case before the courts without legal representation. Furthermore, it is unclear whether or not the burden is on the defendant to show the existence of one of the criteria. Since appointed counsel at any stage is considered a privilege, this burden most probably is, and will remain, on the defendant. Also, there is the problem inherent in all discretionary powers of insuring equality of treatment, a problem avoided in the United States by elevating the desired result to the status of a constitutional right. While discretion may lower the bill to the taxpayer, it also reduces clarity and certainty and may result in different brands of justice. Finally, the British courts will

68 41 FORDHAM L. REV. 722, 730 (1973).

69 English, *supra* note 3, at 344.

70 WIDGERY COMM., *supra* note 30, at 48.

71 *Id.*

investigate the interests of justice only for those who *ask* for legal assistance. While this may be satisfactory in committal proceedings since in general they cannot continue unless counsel is present, it is a different matter when a trial is involved. Indeed, some sources claim that many defendants in Magistrates Court go unrepresented even though that court tries serious cases and sends more people to jail than higher courts.⁷² One sampling of 720 cases supported this assertion, revealing nonrepresentation in significant numbers: 95 percent for crimes of social security fraud, 85 percent for cases of receiving stolen goods, 80 percent in firearm offenses, 75 percent in malicious damage charges, 72 percent in wounding cases, and 53 percent in drug violations.⁷³ Other surveys indicate similar results.⁷⁴ In fairness, it must be stated that these figures do not separate those unrepresented defendants who failed to exercise a request for aid from those who did, which raises the question of the duty of the court to inform the defendant of the availability of assistance. While it is not absolutely certain, it is at least probable that the court has a positive duty to inform a defendant that he can ask for legal representation. There is case law⁷⁵ as well as empirical evidence showing this to be the trend. In one poll, eight of nine unrepresented defendants who eventually received prison terms said they had been informed about getting representation, yet only two applied.⁷⁶ Such findings temper the severity of the figures relating to the overall unrepresented rate listed above. At the same time, the reasons given for failure to apply are informative: guilty, so of no use; refused last time, so no reason to try again; offense not serious enough.⁷⁷ These reasons do not provide a very effective argument for allowing a defendant to go unrepresented whether he asked for help or not. What in fact is being permitted is rather unintelligent waiver of counsel by criminal defendants who have little or no expertise in law. Vigorous and active encouragement or information is needed to assure that a defendant is properly making a choice. This course is no doubt followed by many judges, but those on the bench who disapprove of court-ordered counsel can just as easily go the other way.

Amidst the turmoil of assertions, the figures indicate that most of those who do apply for representation in indictable offenses in Magistrates Court receive it (91.1 percent in 1972).⁷⁸ This is also true with regard to strictly summary offenses—in 1972 the courts granted 69.3 percent of legal assistance requests.⁷⁹ So high a degree of representation for misdemeanor defendants is unheard of in the United States and brings out the advantage of the flexibility in the British system. Even in these cases, the British courts make the determination of whether representation will be given to a particular defendant on the basis of the “interests of justice,” regardless of the offense or the stage of the

72 JUSTICE, BRITISH SECTION OF THE INT’L COMMISSION OF JURISTS, *THE UNREPRESENTED DEFENDANT IN MAGISTRATES COURT* 7 (1971) [hereinafter cited JUSTICE].

73 Zander, *Unrepresented Defendants in the Criminal Courts*, 1969 CRIM. L. REV. (Eng.), 632, 642.

74 JUSTICE, *supra* note 72, at 9-12.

75 *Regina v. Hooper* [1967], 1 W.L.R. 657 (C.A. 1966).

76 BORRIE & VARCOE, *supra* note 14, at 36.

77 *Id.*

78 1972 CRIMINAL STATISTICS, *supra* note 64, at 211.

79 *Id.*

proceedings. This certainly alleviates some of the disadvantages of using discretion, but whether it justifies the possibility of inequality of treatment is a matter of opinion.⁸⁰ When it is considered that in one study the granting of legal aid for summary offenses ranged from a high of 60 percent in one area to a low of 3 percent in another,⁸¹ there is indisputably room for doubt. The difficulty is further compounded since there is no appeal from a court's order refusing legal representation. This leaves defendants with supposedly the same rights in a quagmire of differing degrees of justice. If this state of affairs existed in the United States, a valid equal protection argument could be raised. That this situation does not exist in our country is due to the strict constitutional guidelines applicable to all.

While the foregoing discussion refers to the Magistrates Court, brief mention must be made of the Crown Courts which handle the smaller number of yet the more serious criminal offenses. Like the Magistrates Court, the Crown Court can give legal assistance based on the financial need and interests of justice criteria.⁸² Although the Widgery test for the interests of justice was laid down for the Magistrates Courts,⁸³ it is applied as well by the Crown Courts. Representation in the Crown Court is almost universal and although it is discretionary, the ultimate result differs little from a system where there is an absolute right to counsel. The following table shows the extent of representation for *all* defendants before the court:

Representation in Crown Court (Quarter Sessions
and Assizes in 1970) on Indictment⁸⁴

	1970	%	1972	%
Legal Aid for proceedings in Crown Court on order of Magistrates Court	37,114	84.1	46,811	85.3
Legal Aid for proceedings in Crown Court on order of Crown Court	4,087	9.2	4,273	7.8
Legal Aid Refused	59	.1	28	.05
Private Representation	2,238	5.03	3,329	6.1
Total Representation	43,498	98.6	54,441	99.3
Unrepresented	607	1.4	401	.7

80 To see how inequality can result, one must look briefly at the administrative structure in dispensing legal assistance. Criminal Justice Act 1967, c. 80, § 83 (1)(b) allows rules to be set up whereby a member or officer of the court can exercise the power to grant legal aid once the accused has made application. The party exercising the power is usually the clerk in the Magistrates Court. These clerks (or other officers in higher courts) can pass on applications for legal representation and make appropriate orders. They are prohibited, however, from making outright refusals. If they feel the case is one which does not warrant aid for the defendant, the application must be passed along to the courts for ultimate determination. As might be expected, courts often readily accept the views of their clerks without much discussion. Thus, if one clerk or his court favors representation while another does not, the inequality is apparent. See GREENE, *supra* note 15, at 59.

81 BORRIE & VARCOE, *supra* note 14, at 30.

82 Criminal Justice Act 1967, c. 80, § 75(1) and (2).

83 See text accompanying note 70 *supra*.

84 1972 CRIMINAL STATISTICS, *supra* note 64, at 211; 1970 CRIMINAL STATISTICS, *supra* note 65, at 213.

The figures show a trend toward increased representation for serious crimes. Considering that in 1972 only .7 percent of the defendants in Crown Court were unrepresented in spite of the discretionary system, there is no logical reason why a *right* to counsel should not be declared to exist at this point. The argument that the discretion arrangement which allows extending aid in summary offense cases, as is done in Magistrates Court, does not apply to Crown Court since only the more serious crimes are handled there.

Overall then, the British and American approaches to representation at trial each have advantages. In the United States the right to counsel is firmly established in particular circumstances, *i.e.*, defense of felonies and imprisonable misdemeanors. While the British system fails to declare specific rights, counsel can be provided by the state over a wider range than in the United States—anywhere it is “in the interests of justice.” It is also clear that there is nearly complete representation in the Crown Courts. These two factors when taken together provide an imposing picture of a representation apparatus, but variations in the way that discretion is exercised point out the danger that some defendants will not be represented, especially in Magistrates Court. Problems of such a serious nature are avoided in the United States through the establishment of clear constitutional guarantees.

E. Sentencing

In the United States a right to counsel at the sentencing stage of the proceedings has gradually evolved over the years. In the 1948 decision of *Townsend v. Burke*,⁸⁵ the Supreme Court said the absence of counsel during the sentencing proceeding following a guilty plea, along with untrue assumptions by a court concerning a defendant's previous record, was a violation of due process.⁸⁶ In 1967 in *Mempa v. Rhay*,⁸⁷ it was said that the *Townsend* decision made the right to counsel applicable at sentencing. Following this guideline, American courts now considered it settled law that sentencing is a critical stage in the criminal proceedings at which an accused is entitled to be represented by counsel.⁸⁸

The British position on sentencing has also developed over time and, as in many other areas, discretion has had a great deal of weight. For example, as is the case in some American jurisdictions, British law provides an automatic maximum sentence on conviction. The judge then uses his discretion in the imposition of the actual time to be served.⁸⁹ Under the Criminal Justice Act of 1967 and prior to 1972, discretion was also to be used in regard to the pres-

85 334 U.S. 736 (1948).

86 *Id.* at 740-41.

87 389 U.S. 128, 134 (1967).

88 *McClain v. Swenson*, 435 F.2d 327, 332 (8th Cir. 1970). *See also* *McConnell v. Rhay*, 393 U.S. 2, 4 (1968) (right to counsel at sentencing must be treated like right to counsel at other stages of adjudication); *Losieau v. Sigler*, 406 F.2d 795, 802 (8th Cir. 1969) (right to counsel extends to sentencing proceedings); *Rini v. Katzenbach*, 403 F.2d 697, 699-700 (7th Cir. 1968) (sentencing is a crucial point in the criminal process at which counsel should be present if not waived by defendant).

89 *Rex v. Ball*, 35 Crim. App. 164 (1951).

ence of counsel at sentencing,⁹⁰ although the judiciary had stressed the desirability of having the lawyer present for serious cases even if the defendant pleaded guilty.⁹¹ The rationale was that matters favorable to the accused should be properly laid before the court by a skilled advocate even if they would only remotely aid the defendant. In line with this policy, counsel was generally provided at sentencing in serious cases. However, there was no rule governing how long the term would be before the sentence would be considered serious enough to warrant the presence of an attorney and the courts declined to set out specific guidelines.⁹² As a result, sentencing proceedings had been one point in the English criminal system where defendants were most unrepresented. Statistics show that in 1972, 4.3 percent of the defendants sentenced to jail in Crown Court were not assisted by counsel.⁹³ While this is down from a 1970 figure of 6.7 percent,⁹⁴ it still appears high in comparison to the .7 percent rate for non-representation at trial in 1972. It must also be remembered that this 4.3 percent figure concerns the more serious crimes which are tried in Crown Court. Non-representation at sentencings in the courts was no doubt higher. In response to these results, Parliament included in the Criminal Justice Act of 1972 a provision making the presence of counsel mandatory at any sentencing proceeding by which a defendant will be sent to prison, borstal training, or a detention center.⁹⁵ The requirement may be dispensed with if the defendant has previously been sentenced to the same punishment or if there has been a valid waiver of representation. The basic result of the law is to establish the same right to counsel in sentencing procedures that is known in the United States, but the clause concerning previous punishment cannot be justified. Such a restriction is probably based on the thought that public money should not be expended on hardened criminals. Save money it may, but it also serves to withhold a right to a party simply because of his status as a person previously given the same sentence. This practice of status classification has been soundly condemned in the United States⁹⁶ and should be eliminated in Britain as the law is refined. Lastly, it must be noted that this Act applies only to sentencing and not to the liability stage of the proceedings. The discretionary nature of the remainder of the system, relating to committal, trial and so forth, remains intact.

F. Probation Revocation

Related to the sentencing question is the issue of counsel at probation revocation proceedings. Originally, this was thought to have been settled in the United States by the *Mempa* decision, in which the Supreme Court decided there was a right to counsel when probation is revoked and a deferred sentence is imposed. This was recently modified in *Gagnon v. Scarpelli*.⁹⁷ In that case

90 Criminal Justice Act 1967, c. 80, § 75(1) and (2).

91 Regina v. Serghiou [1966], 1 W.L.R. 1611 (C.A.).

92 Regina v. Green [1968], 1 W.L.R. 673 (C.A.).

93 1972 CRIMINAL STATISTICS, *supra* note 64, at 211.

94 1970 CRIMINAL STATISTICS, *supra* note 75, at 213.

95 Criminal Justice Act 1972, c. 71, § 37.

96 Robinson v. California, 370 U.S. 660, 666-67 (1962).

97 411 U.S. 778 (1973).

the Supreme Court declared that there is no right to counsel at this type of hearing if the defendant makes an admission about the reason for revocation, unless he subsequently raises a timely and colorable claim that he did not actually do the act which he earlier had admitted.⁹⁸ The Court further stated that the need for representation at revocation hearings derives not from the invariable attributes of those hearings but from the peculiarities of particular cases.⁹⁹ In effect, what is now required is a determination by the court in each case whether or not counsel is needed. This is similar to the "interests of justice" test widely used in Britain and thus inhibits the establishment of presence of counsel as an unmitigated right of all criminal defendants.

Strangely enough, while the United States appears to be increasingly restrictive in this area, Britain, despite all her support of judicial discretion, seems to have established an absolute right to counsel at revocation hearings. It is too early to say for certain, but it is likely that the Criminal Justice Act of 1972, making representation at sentencing a right, will be held to extend to probation revocation¹⁰⁰ since it involves a loss of liberty. Both the Criminal Justice Act of 1972 and *Scarpelli* are of such recent vintage that it is difficult to assess the two systems on this point accurately; but given the direction toward which each country is presently heading, it is clear that the British view is the more liberal approach.

G. Appeals

The final area of comparison requiring major consideration is the appeal. There is as yet no constitutional right to appeal in the United States. However, in jurisdictions where there is a statutory right to appeal, there is a right to counsel according to *Douglas v. California*¹⁰¹ in which the Supreme Court said that going forward with the appeal without providing counsel for the appellant was unconstitutional. The Court found insufficient the claim that an appellate court could do justice by examining *ex parte* the record of the trial below in order to determine whether there could be a meritorious appeal that would require counsel, saying that such a practice deprives the defendant of any chance he may have to show the court any hidden merits his appeal may contain.¹⁰² In contrast, the method followed in the United Kingdom allows discretion in giving appellate representation whether leave to appeal is needed or not. When representation is deemed in the "interests of justice," assistance can be ordered either by the court rendering the decision which will be appealed or by the appellate court which will review the case. This latter approach, corresponding to the *ex parte* examination disapproved in the United States, is accepted in England as part of the standard determination of the interests of justice.

Aid that is given for appeals in England today is fairly comprehensive. For example, if a court declares that a defendant shall be represented at trial,

98 *Id.* at 790.

99 *Id.* at 789.

100 Interview with Mr. Keith Uff, *supra* note 5.

101 372 U.S. 353, 357 (1963).

102 *Id.* at 356.

it is generally understood that the court's order includes the defender's advice to the accused on whether there are reasonable grounds to appeal and his assistance in presenting the case to the appellate court if such grounds appear to exist.¹⁰³ Representation for an appeal can be specifically ordered and, if given, it applies not only to the appeal itself but also to "any proceedings preliminary or incidental thereto."¹⁰⁴

The first court of appeal in Britain is the Crown Court, which is also a trial court in the capacity discussed earlier.¹⁰⁵ The degree of appellate representation in this court in recent years is as follows:

Representation at Appeals to Crown Court (Quarter Sessions and Assizes in 1970) Against Decisions of Magistrates Court¹⁰⁶

	1970	%	1972	%
Aid Ordered by Magistrates for Appeal in Crown Court ..	3,393	39.2	4,040	38.8
Aid Ordered for Appeal in Crown Court by Crown Court	1,751	20.2	2,057	19.7
Aid Refused	238	2.7	118	1.1
Private Representation	1,855	21.4	2,192	21.0
Total Representation	7,237	83.6	8,407	80.7
Unrepresented	1,421	16.4	2,008	19.3

Interestingly, the figures show an actual decline in the percentage of persons represented in 1972, a situation rare in comparison to the current trend in Britain; but even with the decline, fully four-fifths of those appealing had representation. The figures also indicate that the problem feared by the United States Supreme Court concerning a review by the appellate court to see if counsel is needed is more often than not avoided in Britain since most aid orders for appeal come from the Magistrates Court rendering the decision to be appealed, thereby making any *ex parte* examination by the appellate court unnecessary.

The high incidence of representation on appeal to the Crown Court is encouraging and is most likely due to the fact that, in entertaining an appeal, the Crown Court has agreed to completely rehear the case on matters of both law and fact, a procedure not employed in the United States. Surely if the lower court found representation to be in the interests of justice at trial, that justification would generally apply to a second hearing of the case as well.

Representation is less prevalent in Britain in the Court of Appeal Criminal Division, which accepts appeals from decisions rendered in the Crown Court as trial court. In confining its attention to matters of law and not affording a complete rehearing on the facts of the case, this court is similar to American appellate courts. However, the discretionary aid that can be extended in this

103 Criminal Justice Act 1967, c. 80, § 73(3)-(8).

104 *Id.* § 73(5)-(7).

105 See text accompanying note 6 *supra*.

106 1972 CRIMINAL STATISTICS, *supra* note 64, at 212; 1970 CRIMINAL STATISTICS, *supra* note 65, at 214.

court has been utilized sparingly as can be seen from recent figures, limited strictly to those who applied for help:

Year	Number considered	Applications for Legal Aid Considered by Court of Appeal Criminal Division ¹⁰⁷					
		Aid ordered but restricted to advice on grounds of appeal and preparation of application for leave to appeal		Aid ordered for representation		Aid refused	
1970	6,847	21	% .3	828	12.1	5,998	87.5
1972	5,427	93	1.7	891	16.4	4,443	81.8

These statistics make it clear that most requests for assistance of counsel are refused; but in line with the general trend in British criminal representation, the presence of the lawyer is becoming more prominent. When this is viewed in conjunction with the degree of appellate representation in the Crown Court, British representation on appeal appears satisfactory, especially since appellate representation can theoretically be given in some Crown Court cases in which representation even at trial would not be given in the United States. While it may be more desirable to make a defendant's chance to appeal a constitutional right, neither system has chosen this route. Still, the British method goes some distance in assuring representation on appeal and when the "interests of justice" for providing appellate representation are examined by the trial court rather than by the appellate court, the problem the United States Supreme Court feared in *Douglas* is greatly diminished.

H. Other Proceedings

No examination of the right to counsel would be complete without at least mentioning two other areas: parole revocation and juvenile proceedings. Parole exists in England but is a relatively new concept. As a result, comparison between England and America in this area is better deferred. More can be said in comparing the approaches of providing aid for juveniles. *In re Gault*¹⁰⁸ is the American decision on point. The Supreme Court held that where there is to be a determination of delinquency, counsel is required to help the defendant cope with the law, make proper inquiry into the facts, insert regularity into the proceedings, and ascertain, prepare, and submit a defense.¹⁰⁹ In short, the Court emphasized that juvenile proceedings must meet the requirements of due process and fair treatment, and the right to counsel is included therein.

A juvenile in Britain has no right to counsel. His case is handled in the Magistrates Court and those courts may in their discretion provide assistance. Between 1970 and 1972 representation orders on behalf of juveniles nearly doubled and the rate of the court's refusal to grant aid on request dropped

¹⁰⁷ *Id.*

¹⁰⁸ 387 U.S. 1 (1967).

¹⁰⁹ *Id.* at 36.

from 10.5 per cent in 1970 to 8 per cent in 1972.¹¹⁰ Keeping in mind that the Criminal Justice Act of 1972 requires representation at sentencing, this figure may soon drop further if the sentence proceeding is held to be contained in the liability proceeding itself. This is to be hoped for since all the arguments in favor of an absolute right to counsel can be mustered in behalf of the juvenile, perhaps even more strongly than for any other criminal defendant.

V. Conclusion

With this step-by-step comparison completed, it is time to return to the initial question: Where does the United States really stand with regard to the right to counsel of a criminal defendant, particularly in relation to the system employed in Great Britain? The above discussion demonstrates that the American system of justice stands firmly committed to a policy of an absolute right to counsel at certain stages of the criminal proceeding, thus avoiding the vagueness and uncertainty that can easily result from widespread use of the British judicial discretion approach. The absolute nature of this protection is the prime advantage of the American procedure and, except in certain areas, this advantage is not to be found in the United Kingdom.

Nevertheless, convincing arguments can be put forth for the use of discretion as well. For instance, the use of discretion can result in representation over a wider range of the criminal process and therefore may be more protective in actual practice. Likewise, use of discretion may in reality result in closer examination by the courts of individual cases and circumstances. The best system would be one that provided for an absolute right to counsel to the extent necessary to truly protect basic rights, while at the same time allowing the courts discretion to provide representation to any defendant at a stage in which a definite right to counsel had not been declared. The present British method approaches this, but the suggested core of established rights falls short—the absolute right to counsel is too limited. If the extension of the British right to counsel begun in 1972 in relation to sentencing proceedings continues, the ideal here proposed may evolve. On the other hand, the existing United States core of absolute rights is comprehensive, though decisions like *Scarpelli* and *Ash* tend to retreat from the outer perimeter; but unlike the British, American judges are short on discretionary power. Whether either system will eventually amalgamate both aspects into a full program for legal representation is a matter only time will decide.

Paul R. Mattingly

110 1972 CRIMINAL STATISTICS, *supra* note 64, at 212; 1970 CRIMINAL STATISTICS, *supra* note 65, at 214.